87-665

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,

Petitioner,

v.

JAMES RAY YOUNG,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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**Counsel of Record*

QUESTION PRESENTED

Whether a federal habeas court has jurisdiction to consider a challenge made to a fully served conviction.

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**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Petitioner[1] herein, by and through his attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was delivered on July 20, 1987, and is attached hereto as Appendix D; the order denying rehearing was entered on September 15, 1987, and is attached as Appendix E. *Young v. McCotter,*

1. For clarity, petitioner in this Court and respondent below, James A. Lynaugh, Director, Texas Department of Corrections, will be referred to as "the state," the real party in interest. Respondent in this Court and petitioner below, James Ray Young, will be referred to as "Young."

821 F.2d 1133 (5th Cir. 1987). The federal district court's order of dismissal is attached as Appendix C, and the underlying magistrate's report and recommendation is attached as Appendix B. *Young v. Procunier*, No. S-80-135-CA (E.D. Tex.) (unpublished).

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1987. A timely filed suggestion for rehearing *en banc* was denied on September 15, 1987. This petition for writ of ceritorari is filed within thirty days after final judgment in the court below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2241 provides, in pertinent part, as follows:

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;

Title 28 U.S.C. § 2254 provides, in pertinent part, as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in State Courts

The state has custody of Young pursuant to a judgment and sentence of the Criminal District Court No. 2 of Dallas

County, Texas, in Cause No. F76-4846-PI, styled *The State of Texas v. James Ray Young*. Young was charged with the felony offense of burglary, to which he entered a plea of not guilty. Young was tried by a jury, which on July 13, 1976, found him guilty of the offense charged in the indictment. Two prior convictions were alleged in the indictment for enhancement of sentence:

> 1. Cause No. 27530: Young was convicted of burglary on February 16, 1963, in the 15th District Court of Grayson, County, Texas.
>
> 2. Cause No. E-4624-K: Young was convicted of burglary on February 13, 1964, in Criminal District Court No. 4 of Dallas County, Texas.

When evidence of the prior conviction in Cause No. 27530 was offered at the punishment phase of trial, Young objected that the proper predicate had not been laid (ROA II 294.)[2] The jury found the prior convictions to be true (ROA II 452), and the court assessed punishment of confinement in the Texas Department of Corrections for life (ROA II 453). *See* Tex. Penal Code Ann. § 12.42(d) (Vernon 1974), amended effective September 1, 1983 (Vernon Supp. 1984).

Young's conviction in the primary case (Cause No. F76-4846-PI) was affirmed by the Texas Court of Criminal Appeals. *Young v. State*, 573 S.W.2d 817 (Tex. Crim. App. 1978) (ROA II 184-86). Young did not perfect an appeal from either of the two prior convictions alleged for enhancement.

Young has filed two applications for state writ of habeas corpus, the second of which attacked his 1964 prior conviction and is not relevant to this appeal. The first application, which was filed in the 15th District Court of Grayson County, Texas challenged Young's prior conviction in Cause No. 27530. The trial court held an evidentiary hearing on March 30, 1979, at which Young was represented by appointed counsel, Maury Hexamer (ROA II 69-183). Young testified to an alibi defense (ROA

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2. "ROA" refers to the record on appeal in the court below. The appendices are referred to as "A.A." through "A.E."

II 96-97) and to facts regarding his counsel's alleged ineffectiveness (ROA II 106-07, 122). The only other witnesses presented by Young were Alton B. Lynch, the Grayson County District Clerk, who testified as to the authenticity of Young's documentary evidence (ROA II 71-75), and J.C. Robinson, court reporter of the 15th District Court, who testified that he no longer possessed his notes of Young's guilty plea (ROA II 77-83). Wilson F. Walters, the attorney who had represented Young at his 1963 guilty plea, testified and contradicted Young's version of events (ROA II 131 *et seq.*). Walters specifically testified that Young admitted his guilt (ROA II 151), and that Young never advised him of an alibi defense or any other exculpatory evidence (ROA II 134, 137, 151). J.C. Robinson, the court reported for the 15th District Court, testified as to the presiding judge's usual practice at guilty plea proceeds (ROA II 77-83). Following the hearing, the trial court made written findings of fact and conclusions of law in which it rejected Young's testimony and instead credited that of Walters (ROA II 59-63). On September 19, 1979, the Texas Court of Criminal Appeals denied the application without written order (ROA II 1). *Ex parte Young*, Application No. 8226.

B. Course of Proceedings and Disposition in Federal Courts

Young filed the instant writ application *pro se* raising claims in the federal district court relating solely to his 1963 conviction. *Young v. Estelle*, No. S-80-135-CA. The state noted in its motion to dismiss, filed in response to the court's show cause order, that Young had completely served his sentence for that conviction, but that Young could challenged the conviction because it had been used to enhance his punishment to a life sentence in 1976 (ROA I 13).

Ms. Hexamer again was appointed to represent Young. During a pre-hearing phone conference on August 20, 1984, Ms. Hexamer indicated to the federal magistrate and to counsel for the state that Young desired to challenge *only* his prior conviction in 1963 and not the primary conviction in 1976 (ROA I 84). The state objected, noting that there was no "custody" and thus no habeas corpus jurisdiction to challenge only a prior conviction and not its subsequent use for enhancement. Eight days later a brief on Young's behalf was forward by Ms. Hexamer

to the magistrate in which she reiterated Young's desire to challenge *only* his 1963 conviction (A.B. 2-3, 15; ROA I 83-84, 96).[3]

An evidentiary hearing was conducted before the magistrate on September 13, 1984, at which time Young offered the testimony of himself, his mother, Aline Matz, and his cousins, Lynn Prieskop and Helen Potter. The state objected to receiving their testimony because their identity and the substance of their testimony was not presented to the state courts, and that by presenting their testimony Young had rendered his petition subject to dismissal for lack of exhaustion of state remedies (ROA III 19-20, 89-90). The state also objected to receiving testimony from Young relating to his 1976 conviction on the ground of relevancy (ROA III 65, 90). The state offered no evidence at the hearing.

The magistrate then entered a memorandum and recommendation in which he found that Young had satisfied both the statutory custody and exhaustion requirements and also found that Young received ineffective assistance of counsel at his 1963 conviction (A.B.; ROA I 82 *et seq.*). On December 31, 1985, the court overruled the state's objections to the magistrate's findings and conclusions and granted the writ (A.C.; ROA I 132 *et seq.*).

On July 20, 1987, a panel of the Court of Appeals for the Fifth Circuit vacated the judgment of the district court and remanded for a determination whether Young was deliberately misled by the prosecutor, a claim not raised in or considered by the court below. *Young v. Lynaugh*, No. 86-2064 (A.D.). The panel found that Young was "in custody" pursuant to the conviction attacked herein as required by 28 U.S.C. § 2254(a) and that he had exhausted his state remedies as required by 28 U.S.C. § 2254(b), (c). On September 15, 1987, the court denied the state's suggestions for rehearing *en banc*.

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3. The reason for this decision undoubtedly is that Young hopes to avoid the procedural default doctrine in any subsequent federal habeas action challenging use of the 1963 conviction for enhancement at his 1976 trial. This point is more fully discussed, *infra*, at 11-12.

SUMMARY OF ARGUMENT

There are special and important reasons to grant the writ. The opinion of the court below wrongly decides an issue which goes to the heart of our system of jurisprudence, the very power of a federal court to decise a case. The court below erred in holding that the court below had subject matter jurisdiction to consider Young's challenge made to *only* his fully served 1963 conviction. Because Young, by and through counsel, has made the conscious decision to challenge only the 1963 conviction and not its subsequent use for enhancement of punishment at his 1976 trial, he is not, for purposes of this lawsuit, "in custody" pursuant to the 1963 conviction as required by 28 U.S.C. §§ 2241, 2254(a).

The court of appeals found that Young is "in custody" pursuant to the 1963 conviction on two grounds: (1) because it was used to enhance his punishment in 1976 and (2) because it may affect his parole eligibility for his 1976 conviction. The Fifth Circuit's opinion promotes procedural gamesmanship in that it allows habeas petitioners such as Young to allege subsequent use of a prior conviction for enhancement as a basis for federal jurisdiction over a suit which purposefully avoid any mention of the purported ground of jurisdiction. Moreover, it allows petitioners to circumvent the procedural default doctrine when they file subsequent writs challenging the use of prior convictions for enhancement.

Further, under this Court's decision in *Lane v. Williams*, 455 U.S. 624 (1982), any effect of the 1963 conviction on Young's eligibility for parole from his 1976 conviction is too speculative and remote to support the federal habeas court's exercise of jurisdiction. This ground of jurisdiction will open the floodgates of *pro se* litigation in that recidivistic inmates now will be able to file habeas actions challenging a myriad of fully served prior convictions.

Finally, the court's opinion sanctions Young's abusive approach to litigation whereby he seeks to avoid the procedural default due to his failure to object when the 1963 conviction was introduced at his 1976 trial.

ARGUMENT

YOUNG IS NOT "IN CUSTODY" PURSUANT TO THE 1963 CONVICTION ATTACKED HEREIN.

The court of appeal's opinion discusses this appeal as though it were a game.[4] Determining the validity of a state criminal conviction is not a game. This case concerns the power of the state to imprison a citizen as a sanction for his criminal transgressions. The question presented—whether Young is "in custody" for purposes of this action—goes to the very core of our system of justice, *i.e.*, the very power of a federal court to decide a case.

Congress conferred habeas corpus jurisdiction upon the federal courts in 28 U.S.C. § 2241(c), which provides: "The writ of habeas corpus shall not extend to a prisoner unless he is *in custody* . . . ." (emphasis added). *See also* 28 U.S.C. § 2254(a); Rule 2(a), 28 U.S.C. fol. § 2254. While there is no longer any need for a petitioner to show present physical custody, *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), *Jones v. Cunningham*, 371 U.S. 236 (1963), the custody requirement has not disappeared altogether. One firmly established tenet of federal habeas law is that 28 U.S.C. §§ 2241 and 2254 do not confer jurisdiction to consider a challenge made to a sentence which has been fully served. *Parker v. Ellis*, 362 U.S. 574, 576 (1960).

Young was convicted of burglary in 1963 and received a two-year sentence. In 1976, Young again was convicted of burglary, and two prior convictions, including the one in 1963 for burglary, were used to impose the mandatory sentence of life. *See* Tex. Penal Code Ann. § 12.42(d) (Vernon 1974), amended effective September 1, 1983 (Supp. 1984). In his federal habeas application, Young specifically elected to challenge *only* the 1963 conviction without also challenging its use for enhancement of

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4. *See e.g.*, "The Players and the Background" (A.D. 4), "Jurisdiction on the § 2254(a) Playing Field" (A.D. 6), "the habeas hash marks," "The state's argument again runs out of bounds" (A.D. 8), "the state is improperly in motion before the snap"(A.D. 10), "The final score" (A.D. 17).

punishment in the 1976 conviction. Young has fully served the two-year sentence he received in 1963; any and all collateral consequences Young suffers result solely from his incarceration under the 1976 conviction. It is only because the 1963 conviction was used for enhancement in 1976 that Young can meet the custody requirement. *See, e.g., Burgett v. Texas,* 389 U.S. 109 (1967) (habeas petitioner may challenge prior conviction which is used against him in a subsequent trial).

The Fifth Circuit found two bases for the district court's jurisdiction. First, the court found that because the 1963 conviction was later used for enhancement, there is "a positive and demonstrable nexus between Young's current custody and the allegedly unconstitutional conviction sufficient to meet the jurisdictional requirement of § 2254(a)." (A.D.8). This conclusion is, at best, a *non sequitur.* As the state has conceded all along, Young *is* in custody pursuant to the use of the 1963 conviction for enhancement of punishment at his 1976 trial. He is not, however, in custody pursuant to *only* his fully served 1963 conviction. Because Young's present incarceration stems from both the 1976 conviction and the use of the 1963 conviction for enhancement, it follows that he should be required to attack the use of the 1963 conviction for enhancement in 1976 and not be allowed to challenge only the validity of the 1963 conviction and sentence.

A. The opinion of the court below promotes piecemeal litigation.

Young, represented by counsel, has made the deliberate choice to challenge only the fully served 1963 conviction. There is, of course, a reason why Young has consciously elected to proceed in this manner: his desire to avoid the procedural default doctrine of *Wainwright v. Sykes,* 433 U.S. 72 (1977), when he brings a subsequent habeas action challenging use of the 1963 conviction for enhancement in 1976. This point is fully discussed, *infra,* at 11-12. Whether viewed in terms of the statutory custody requirement or as a matter of policy, the net result is to encourage habeas petitioners to bring their claims piecemeal.

The only relief Young obtained from the court below is a declaratory judgment that his 1963 conviction is void. Young's

current custody for his 1976 conviction—including his life sentence which resulted from the use of the 1963 conviction for enhancement—remains unaffected. In order to obtain relief from his 1976 conviction and sentence, Young must now bring a new habeas action challenging use of the 1963 conviction for enhancement in 1976. By allowing Young to focus his federal habeas challenge on *only* the fully served 1963 conviction, the Fifth Circuit's opinion affirmatively promotes piecemeal litigation in violation of the spirit of the abuse of the writ doctrine codified in Rule 9(b), 28 U.S.C. fol. § 2254, and the total exhaustion rule of *Rose v. Lundy*, 455 U.S. 509 (1982). Neither the district court, the court below, nor Young himself has ever advanced any reason why he should be allowed to proceed in this manner or how the interests implicated by the federal habeas statute are furthered by this mode of litigation.

B. The opinion of the court below opens the floodgates for new habeas claims.

The second basis for jurisdiction which the court of appeals found is that "according to Texas parole procedure, Young will receive credit 'in some degree' if he succeeds on the merits of his petition . . . ." (A.D. 9). Again, neither Young, the district court, nor the court of appeals has delineated to what extent Young's parole eligibility for his 1976 conviction will in fact be affected by voiding the 1963 conviction. Moreover, Young had another prior conviction and his criminal record, consisting of these two convictions, is but one of four factors to be considered regarding release on parole. Tex. Rev. Civ. Stat. Ann. art. 6181-1 § 2 (Vernon Supp. 1984).

This overly expansive view of the "in custody" requirement cannot be squared with *Lane v. Williams*, 455 U.S. 624 (1982). There, the Court considered whether the effect of a prior conviction on subsequent parole determinations was a collateral consequence within the meaning of *Carafas v. LaVallee*, 391 U.S. 234 (1968), which would prevent a habeas action from becoming moot. The Court decided that it was not.

> The parole violations that remain a part of respondents' records cannot affect a subsequent parole determination unless respondents again violate

> state law, are returned to prison, and become eligible for parole. Respondents themselves are able—and indeed required by law—to prevent such a possibility from occurring. Moreover, the existence of a prior parole violation does not render an individual ineligible for parole under Illinois law. It is simply one factor, among many, that may be considered by the parole authority in determining whether there is a substantial risk that the parole candidate will not conform to reasonable conditions of parole.
>
> Collateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid.

Id. at 632 n. 13.

Because the effect of a prior conviction on subsequent parole consideration is insufficient to avoid the mootness doctrine, as *Lane v. Williams* holds, *a fortiori* it is insufficient to satisfy the "in custody" requirement of § 2254(a). *Cf. Carafas v. LaVallee*, 391 U.S. 237-38 (collateral consequences such as civil disabilities resulting from conviction may be sufficient to avoid dismissal for mootness) and *Spring v. Caldwell*, 692 F.2d 994, 999 (5th Cir. 1982) (specific provision for incarceration in original sentence necessary to establish custody under federal habeas statute).

Under the Fifth Circuit's rule of law, any repeat offender incarcerated in the Texas penal system can now attack any prior conviction, regardless whether it has been fully served, because it might conceivably affect his parole eligibility. For example, a hardened recidivist will have many fully served prior convictions. The court of appeals' opinion allows him to bring separate habeas actions challenging each of the prior convictions because they "may" affect his eligibility for parole from his current incarceration. The resulting burden on the federal judicial system will be tremendous. Further, this result is particularly ironic in that a ex-convict who is rehabilitated and foregoes subsequent criminal behavior, unlike Young, may not challenge his fully

served convictions. This rationale rewards, rather than punishes, criminal behavior and is offense to the equitable nature of federal habeas corpus.

C. The opinion of the court below unfairly deprives the state of its procedural default defense.

The procedural default doctrine enunciated in *Wainwright v. Sykes,* 433 U.S. 72 (1977), instructs that absent cause for the procedural default and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas corpus relief to a state prisoner whose claim is non-reviewable in state court because of the default. *See Engle v. Isaac,* 456 U.S. 107 (1982). At his 1976 trial, Young did not object to the 1963 conviction on the grounds raised herein (ROA II 294). It is well settled that a petitioner's failure to object to evidence of prior convictions constitutes a procedural default of any challenge to the validity of those convictions. *E.g., Weaver v. McKaskle,* 733 F.2d 1103 (5th Cir. 1984). The procedural default doctrine does not apply, however, where the state courts have not refused reviewed on procedural grounds. *Moran v. Estelle,* 607 F.2d 1140 (5th Cir. 1979).

As explained in *Escobedo v. Estelle,* 650 F.2d 70, 74 & n.9 (5th Cir.), *modified* on *rehearing,* 655 F.2d 613 (5th Cir. 1981). Texas habeas procedure does not have an "in custody" requirement similar to federal habeas; thus, the defendant can attack the validity of a prior conviction independent of its subsequent use for enhancement. That is precisely what Young did. Young raised the claims he asserts herein in regard to his 1963 conviction only in a post-conviction writ which was filed in the 15th District Court of Grayson County, Texas, the court out of which the 1963 conviction arose. Young can challenge his 1976 conviction only by filing a post-conviction writ application in Criminal District Court No. 2 of Dallas County, Texas, which is the court out of which that conviction arose. *See* Tex. Code Crim. Proc. Ann. art. 11.07, § 2(b) (Vernon 1977 and Supp. 1984). Because Young did not file his application in the Dallas County court or attack use of the 1963 conviction for enhancement at his 1976 trial in Dallas, the state courts never have had occasion to determine whether Young's claims are subject to

procedural default due to his failure to object when the 1963 conviction was introduced at the 1976 trial.

The court of appeals pretermitted the question whether Young's state-court challenge to only the 1963 conviction will serve to exhaust his state remedies for a subsequent federal action challenging use of the 1963 conviction for enhancement in 1976. (A.D. 11). When Young brings such a subsequent action, he surely will argue that procedural default does not apply because the state courts addressed the merits of his claims in rejecting his challenge to only the 1963 conviction. If this argument is accepted, Young will have succeeded in his gamesmanship in that he will have avoided the consequences of his failure to object at the 1976 trial and the state will be unfairly deprived of the right to assert a procedural default.

CONCLUSION

For the above reasons, the state requests that the petition for writ of certiorari be granted and that Young's application for writ of habeas corpus be dismissed for want of jurisdiction.

Respectfully submitted,

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MARY F. KELLER
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Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAMES RAY YOUNG

v.

ESTELLE, W.J., Director,
Texas State Department of Corrections,
and THE ATTORNEY GENERAL
OF THE STATE OF TEXAS

PROCEEDINGS

11-12-80 PRELIMINARY REPORT of U.S. Magistrate recommending that Complaint be filed in forma pauperis, and that it be assigned to the appropriate U.S. Magistrate for further handling.

11-12-80 ORDER dated 11-7-80 Allowing Petition to be filed without the prepayment of costs and designating U.S. Magistrate Houston Abel to conduct an evidentiary hearing on the merits, if necessary, and to submit to the appropriate Judge his proposed findings of fact and conclusions of law and his recommendations for the disposition of said Petition. WWJ V.36 p.4

11-12-80 PETITION FOR WRIT OF HABEAS CORPUS.

11-12-80 AFFIDAVIT In Support of Request to Proceed in Forma Pauperis.

11-12-80 Mailed certified copy of Order entered this date to Petitioner.

11-12-80 Mailed complete copy file and copy of docket sheet to Mag. Abel.

1-9-81 SHOW CAUSE ORDER dated 1-6-81. Respondent to answer in full compliance with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, within (Forty) 40 Days of receipt of this Order.

1-9-81 Mailed certified copy of Show Cause Order to Petitioner. Mag. Abel. Mailed certified copy of Show Cause Order to Attorney General, Austin, with copy of Petition filed 11-12-80, by certified mail No. P140300

1-9-81 Copy File was returned from Mag. Abel's Office, Tyler, Texas.

1-12-81 Mailed complete copy file to Mag. Abel, Tyler, Texas.

1-16-81 Received Return Receipt for Show Cause Order mailed to the Attorney General, Austin, signed by Leon Scott showing date received 1-14-81

2-19-81 MOTION of Respondent to Dismiss. (Motion Letter Mailed)_____ Mailed copy of Motion With Proposed Order to Mag. Abel, Tyler, Texas

2-25-81 MOTION of Petitioner for an extension of Time to Respond to Motion of Respondent to Dismiss. (Mailed copy of Motion to Mag. Abel) (Ltr.)

2-25-81 Mailed copy of the Motion of Respondent to Dismiss filed 2-19-81 to Petitioner in Huntsville, Texas.

3-2-81 MOTION of Petitioner for Extension of Time to Respond to Motion of Respondent to Dismiss. *FORMAL (Mailed copy of Formal Motion to Mag. Abel, Tyler)

3-2-81 Received Certified Copies of STATE COURT RECORDS and mailed to Mag. Abel, Tyler, Texas.

3-4-81	Petitioner's TRAVERSE to Motion of Respondent to Dismiss. (Mailed copy of Petitioner's Traverse to Mag. Abel, Tyler)
5-22-81	MOTION of Petitioner for Appointment of Counsel. (Mo. Ltr. Mld.)_____ (Copy of Motion mailed to Mag. Abel, Tyler)
6-8-81	MOTION of Petitioner for Appointment of Counsel. (Copy mailed to Mag. Abel)
10-28-81	Petitioner's Motion in Opposition to the Respondent's Motion to Dismiss. (Copy to Mag. Abel)
10-28-81	MOTION of Petitioner for Evidentiary Hearing and Appointment of Counsel. (Copy to Mag. Abel)
7-14-83	ORDER dated 7-1-83 withdrawing this case from the docket of Mag. Abel and Referring same to Mag. Roger Sanders, Sherman, Texas. GEN.ORDER WWJ WMS RMP
7-14-83	Mailed copy of Order entered this date to Petitioner and Respondent's Attorney.
7-14-83	Prepared complete copy file with copy of docket sheet for Mag. Sanders.
8-1-84	Received Appointment papers for attorney, Maury Hexamer, Sherman, Texas, as counsel for Petitioner.
8-24-84	BRIEF OF RESPONDENT in Response to Petitioner's Application for Writ of Habeas Corpus. (Copy to Mag. Sanders)
9-4-84	ORDER of this Date SETTING EVIDENTIARY HEARING ON SEPTEMBER 13, 1984 at 1:00 P.M., BEFORE THE U.S. MAGISTRATE IN THE 15th DISTRICT COURTROOM AT THE GRAYSON COUNTY COURTHOUSE, SHERMAN, TEXAS. MAG. SANDERS (See Next Page)

9-4-84 Mailed copies of Order entered this date as follows:

(2) to U.S. Marshal, Tyler.
(1) to Petitioner
(1) to Petitioner's Court-Appointed Attorney
(1) to Attorney General, Austin
(1) to Grayson County Sheriff

(1) to Director of Special Services, P.O. Box 99, Huntsville, Texas, 77340.

9-21-84 MARSHALL'S RETURN ON ORDER FOR EVIDENTIARY HEARING:
"Executed this order by taking custody of James Ray Young at the Grayson County Jail on 9-14-84 and producing him before U.S. Magistrate Roger Sanders and returning him to the custody of TDC after the hearing "RA Kearnes, DUSM

1-24-85 BRIEF of Respodent on Jurisdiction and Exhaustion. (Copy to Mag. Sanders)

2-6-85 Mailed to Circuit Executive, New Orleans, La, for Approval original CJA-20, Voucher for payment of Court-Appointed Attorney, Maury Hexamer, in the sum of $3,412.02, approved by Mag. Sanders.

2-28-85 Remailed to Circuit Executive, New Orleans, La., for Approval original CJA-20, Voucher for payment of Court-Appointed Attorney, Maury Hexamer, in the corrected sum of $5,458.02, approved by Mag. Sanders.

3-25-85 Mailed to Administrative Office, Washington, D.C., Original CJA-20, Voucher for payment to Court Appointed Attorney, Maury Hexamer, the sum of $5,458.02, approved by Mag. Sanders and the Chief Judge Court of Appeals.

4-26-85	REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE recommending the Respondent's Motion to Dismiss be Denied and that Petitioner's application for habeas corpus relief be granted.
4-26-85	Mailed copy of report and recommendation to Petitioner, Mag. Sanders, to his court appointed and to defendant's attorney by certified mail return receipt requested. (Mailed copy to Mag. Sanders)
5-3-85	Received return receipt showing that Petitoner received his copy of the Magistrate's report on 4-30-85.
5-6-85	MOTION of Respondent for Extension of Time to Respond to Magistrate's Report and Recommendation. (Copy to Mag. Sanders)
5-6-85	Received return receipt showing that Defendant's Attorney Received his copy of the Report of the U.S. Magistrate on 5-1-85.
5-6-85	Petitioner's copy of the Magistrate's Report refused by him because the envelope had been opened and resealed with tape. Remailed to him this date c/o Warden at Huntsville, with receipts therefor.
5-9-85	ORDER dated 5-8-85 Granting Respondent an Extension of Time (until 5-20-85) in which to Respond to the Magistrate's Report and Recommendation.
5-9-85	Mailed copy of Order entered this date to Petitioner, Mag. Sanders, to his Court appointed attorney and to defendant's attorney. (Copy to Mag. Sanders)
5-13-85	Received return receipt showing that the Warden at TDC, Huntsville, Texas, received the copy of Magistrate's Report to be delivered to Petitioner on 5-8-85.

5-13-85	Returned Receipt from Petitioner showing that he received his copy of the Magistrate's Report on May 9, 1985.
5-22-85	MOTION of Respondent for Extension of time to file a response to the Report of the U.S. Magistrate. (Copy to Mag. Sanders) (Moot)
5-29-85	OBJECTIONS of Respondent to the Report and Recommendations of the United States Magistrate.
5-29-85	Mailed complete copy file to Judge Justice in Tyler. (State Court Papers retained in Sherman)
12-31-85	ORDER dated 12-30-85 Denying respondent's motion to dismiss based on failure to meet the "in custody" requirement of 28 U.S.C. 2254(b) and Granting Petitioner's Application for habeas corpus relief from his 1963 burglary conviction, Case No. 27530, in the Dist. Court of Grayson County, 15th Judicial District of Texas. Further that issuance of the writ of habeas corpus shall be stayed for a period of twenty days after the date of service of this order upon respondent's counsel, in order that respondent may take such actions as may be necessary to appeal from this order, should he choose to do so. WWJ V. 45 P. 164
12-31-85	Mailed copy of Order entered this date to Petitioner and to Petitioner's attorney. Mailed copy of order to respondent's attorney by certified mail return receipt requested. Mailed copy of order to Mag. Sanders.
1-29-86	RESPONDENT'S NOTICE OF APPEAL.
1-29-86	MOTION of Respondent for Stay of Judgment Pending Appeal.
1-29-86	Mailed Copy of Notice of Appeal to each Attorney. (& to Petitioner)

1-29-86	Mailed Appeal Information Sheet to Attorney General.
1-29-86	Mailed copy of Notice of Appeal and of the Docket Sheet to Fifth Circuit Court of Appeals.
2-5-86	ORDER dated 2-3-86 granting Respondent's Motion for Stay for Judgment Pending Appeal.WWJ
2-5-86	Mailed copy of Order entered this date to Petitioner and to each attorney.
2-10-86	Received copy of TRANSCRIPT ORDER from Assistant Attorney General.
3-10-86	TRANSCRIPT OF PROCEEDINGS AT EVIDENTIARY HEARING Held in Sherman, Texas, on September 14, 1984, before MAGISTRATE ROGER SANDERS. Original tapes therefor placed in file.
3-10-86	Mailed Record on Appeal (in 3 Volumes — Pleadings, State Papers & Transcript), to Fifth Circuit Court, and mailed copy of transmittal letter with copy of Index to Record to Petitioner, his Court-Appointed Attorney, and to the Assistant Attorney General.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAMES RAY YOUNG,	§	
Petitioner	§	
VS.	§	**CIVIL ACTION**
	§	**S-80-135-CA**
R.K. PROCUNIER,	§	
Director, Texas Department	§	
of Corrections, *Respondent*	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

PROCEDURAL MATTERS

Respondent has custody of Petitioner by virtue of a judgment and sentence entered by the Criminal District Court No. 2 of Dallas County, Texas, in Cause No. F76-4846-PI, styled *The State of Texas v. James Ray Young.* Petitioner was there charged with the felony offense of burglary, to which he entered a plea of not guilty. Upon trial by jury, on July 13, 1976, he was found guilty as charged in the indictment. Two prior convictions were set forth in the indictment for enhancement of sentence:

> (1) Cause No. 27530: Petitioner was convicted of burglary on February 16, 1963, in the 15th District Court of Grayson County, Texas.
>
> (2) Cause No. E-4624-K: Petitioner was convicted of burglary on February 13, 1964, in Criminal District Court No. 4 of Dallas County, Texas.

Upon proper proof, the jury found that Petitioner had been so convicted, and the court assessed the mandatory punishment of confinement in the Texas Department of Corrections for life. See Tex.Penal Code Ann. §12.42(d) (Vernon 1974) amended effective September 1, 1983 (Supp. 1984).

Petitioner did appeal his conviction in Cause No. F76-4846-PI, which was affirmed by the Texas Court of Criminal Appeals in 1978. *Young v. State*, 573 S.W.2d 817 (Tex.Crim.App. 1978). However, Petitioner did not appeal from either of the two prior convictions alleged for enhancement purposes.

Petitioner has since filed two applications for state writ of habeas corpus. The first application, filed in the 15th District Court of Grayson County, Texas, challenged Petitioner's conviction in Cause No. 27530. The trial court held an evidentiary hearing in that cause on March 30, 1979. On June 27, 1979, the state court issued a six-page order denying relief, and containing extensive findings of fact and conclusions of law. On September 19, 1979, the Texas Court of Criminal Appeals denied Petitioner's application without written order.

The second application was filed in Criminal District Court No. 2, Dallas County, Texas, and challenged Petitioner's conviction in Cause No. E-4624-K. This application was denied by the Court of Criminal Appeals on May 25, 1983. *Ex parte Young*, Application No. 8226.

Petitioner filed the instant federal writ application *pro se* on November 12, 1980, raising claims relating solely to his prior conviction in Cause No. 27530. Respondent noted its motion to dismiss filed February 17, 1981, in response to the show cause order, that Petitioner had completely served his sentence on Cause No. 27530, but that Petitioner could challenge this conviction because it had been used to enhance his punishiment to a life sentence in Cause No. F76-4846-PI. Later Maury Hexamer, a practicing attorney in Grayson County, Texas, was court-appointed to represent Petitioner in this cause. During a pre-hearing telephone conference which was conducted on August 20, 1984, Petitioner's attorney confirmed to the undersigned and counsel for Respondent that Petitioner sought to challenge only the conviction in Cause No. 27530, without challenging the primary conviction in Cause No. F76-4846-PI. Respondent objected to such a procedure noting that there was no "custody" and thus no habeas jurisdiction to challenge only a prior conviction. Eight days later a brief was filed on Petitioner's behalf repeating Petitioner's desire to challenge only

his conviction in Cause No. 27530:

> Petitioner would show the court that in the instant case, he is seeking to challenge only the constitutionality of his conviction in 1963 in Grayson County, Texas and not the constitutionality of his conviction in 1976 in Dallas County, Texas.

Brief, p.3.

An evidentiary hearing was conducted before the undersigned on September 13, 1984, at which Petitioner offered the testimony of himself, his mother, Aline Matz, and his cousins, Lynn Prieskop and Helen Potter. Respondent objected at the hearing to receiving testimony from Petitioner's three releatives on the ground that the identity of these witnesses and the substance of their testimony had not previously been presented to the state courts. Respondent contended that Petitioner's application should be dismissed for failure to exhaust state remedies. Respondent also objected at the hearing to receiving testimony from Petitioner relating to his primary conviction on the ground that because Petitioner desired to challenge only his prior conviction, evidence relating to the primary offense was not relevant. Although given the opportunity to do so, Respondent offered no evidence at the hearing.

PRELIMINARY ISSUES

Petitioner seeks habeas corpus relief, and asserts that the court has jurisdiction under 28 U.S.C. §2254(a). Respondent has vigorously denied such, and has urged that Petitioner has failed to show that he is in "custody" by virtue of a prior conviction used to enhance his current sentence to life. Respondent has argued that the only basis on which "custody" might be shown is the adverse effect on Petitioner by the State due to his "prior criminal history" because such affects Petitioner's eligibility for parole and for mandatory supervision. See V.A.C.S. Art. 6181-1, §2. However, Respondent argues that this basis is too remote, given that the 1963 conviction in question is one of two prior convictions which constitute Petitioner's "prior criminal record"; and that Petitioner's criminal record

is only one of four factors ("conduct, obedience, industry, and prior criminal history") considered by the Texas Department of Corrections under the scheme outline in V.A.C.S. Art. 6181-1. In support of its position, Respondent urges that the case of *Sinclair v. Blackburn,* 599 F.2d 673, 675-76 (5th Cir. 1979) is controlling. In that case the court held that four factors, including Petitioner's prior criminal record, were relief upon by the Board of Pardons of Alabama to deny petitioner clemency in his request for pardon. On this basis, the court reasoned that a single prior conviction was too remotely connected to the Board of Pardon's action to conclude that petitioner was is not "in custody" under 28 U.S.C. §2241(c) and § 2254(a).

Facial similarities between *Sinclair* and this case initially invite Respondent's conclusion. However, closer inspection of this and other cases repells it. First, the rule applied in *Sinclair v. Blackburn, supra,* is that Petitioner must be able to demonstrate a "positive relation" between the prior conviction and present confinement. *Supra,* p. 676. In *Sinclair* the Board of Pardons cited (1) the nature of the "original offense", (2) applicant's "poor prison record", (3) "opposition from law enforcement personnel", and (4) "his past criminal record" as reasons for denial of clemency. In comparing these *Sinclair* factors to the V.A.C.S. Art. 6181-1 factors, it is apparent that the statutory factors really fall into just two *Sinclair* categories: prior criminal history, and prison conduct. The prior record of the petitioner is a precisely parallel factor. However, under V.A.C.S. Art. 6181-1 the factor of prison conduct is dividied into three sub-categories — conduct, obedience, and industry. Thus, the factors considered by the Alabama Board of Pardons in its apparent discretion in the *Sinclair* case are greater in scope than those mandated by V.A.C.S. Art. 6181-1. Further, a close reading of *Sinclair* does not reflect that the Alabama Board of Pardons was limited to only four factors, but rather conceivably could have relied upon other factors. In any event, the factual circumstance in *Sinclair,* is distinguishable from the case here.

Further, it is worthy of note that V.A.C.S. Art. 6181-1 sets up a self-executing "good time" plan once a prisoner has been classified according to the statute, where he earns eligibility

for early release by parole or otherwise, as contrasted to the discretionary all-or-nothing grant of clemency under consideration in *Sinclair*. For example, under V.A.C.S. Art. 6181-1 if a prisoner is placed in Class One, he earns twenty days of "good time" for each thirty days actually served; he earns ten days of "good time" for each thirty days actually served if placed in Class Two; and he earns not less than ten nor more than twenty five days for each thirty days actually served if classified as a Trustee. If he is placed in Class Three, no good time is accrued. Thus, the gradations under V.A.C.S. Art. 6181-1 are critical to the automatic accrual of "good time", and are now perhaps even more critical than ever in light of current widely publicized prisoner overcrowding, and in the wake of early release programs which exist in the Texas Department of Corrections following the *Ruiz v. Procunier*, 503 F.S. 1265 (S.D.Tex. 1980) aff'd. in part, vacated in part, 679 F.2d 1115, amended in part, 688 F.2d 266 (5th Cir. 1982), cert. den. 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983). The good time, of course, does not lead to automatic release, but it substantially shortens the time spent awaiting parole or mandatory supervision. See Tex. Code Crim. Pro. Art. 42.12, §15.

This orderly system for gradually and continually rewarding "good behavior" and a lack of criminal record stands in stark contrast to the all-or-nothing relief sought by the petitioner in *Sinclair v. Blackburn, supra.* There the petitioner applied for a grant of clemency, a statistically possible, but likely improbable goal under Texas law. See Tex. Code Crim. Pro. art. 42.12 §15(f) wherein the distinction between clemency and parole are set forth under Texas law; see also Art. 48.01, *et seq.* The *Sinclair* petitioner sought a grant of pardon where conceivably a single negative factor totally beyond his control — for example, strong opposition by law enforcement personnel — could have kept him from clemency. In fact, the Board of Pardons conceivably could have listed any number of discretionary factors beyond the control of the petitioner which could have led to denial of relief. By way of comparison, however, the factors listed under V.A.C.S. ART. 6181-1 are substantially in the control of petitioner. Whether he is eligible for early parole or mandatory supervision is substantially to be determined by virtue of *his* conduct, *his* industry, and *his* obedience

in light of *his* criminal record. With this analysis it is certainly understandable how the court in *Sinclair v. Blackburn, supra,* had no choice except to rule that the prisoner's past criminal record, coupled with factors beyond his control, was simply too remote a factor to reflect a "positive relation" between his present incarceration and his prior conviction.

The *Sinclair* ruling simply is not controlling here. In this case the prior criminal record of a single prisoner among approximately 38,000 in the Texas Department of Correction system could be sufficient to move that prisoner up or down statutory classification ladder much like a bad grade on a test might move a student's grade up or down on a giant Bell curve. All other things being equal, two prior convictions could mean the difference between being a Class One as opposed to Class Two prisoner, or a Class Two as opposed to a Class Three prisoner. Of course, only the Texas Department of Corrections knows precisely how Petitioner's second conviction affects his eligibility for parole. Since Respondent presumably collects and controls such information, it should not be heard to criticize Petitioner's failure to produce same, it being possible to presume that Petitioner's case would be strengthened by such information if the Texas Department of Corrections would produce it. See *Georgia Southern and FI. RY. Co. v. Perry,* 326 F.2d 921, 925 (5th Cir. 1964); *San Antonio v. Timko,* 368 F.2d 983, 985 (2nd Cir. 1966).

In any event, the criminal case relied upon by the Fifth Circuit in formulating the "positive relation" test, *Cappetta v. Wainwright,* 406 F.2d 1238 (5th Cir. 1969), points out that attacks on prior convictions already served have been allowed because the earlier conviction

> bore some positive relation to their present confinement to the extent that were the prior convictions invalidated, Petitioner's present confinement would be shortened or terminated. *Id.*, p. 1239.

The cases referred to by the Fifth Circuit in reaching this conclusion were *Stubblefield v. Beto,* 399 F.2d 424 (5th Cir. 1968)

and *United States Ex Rel Durocher v. LaVallee,* 330 F.2d 303 (2nd Cir. 1964).

The court in *Cappetta v. Wainwright, supra,* concluded that the district court had jurisdiction to determine whether the relation between the prior conviction and present confinement was such

> as would result in the [petitioner's] receiving credit *in some degree* on the [current] sentence if he should prevail on the merits of his petition. (emphasis added).

Cappetta v. Wainwright, supra, p. 1239.

It is apparent that the evidence of this case tends to establish that Petitioner will receive "credit in some degree" on his current sentence if he is successful on the merits.FN#1 See also *Carter v. Estelle,* 677 F.2d 427, 450 n. 22 (5th Cir. 1982) (wherein it is announced that no rule forecloses the undersigned's recommendation concerning jurisdiction herein); *Escobedo v. Estelle,* 650 F.2d 70, 72-73, modified on petition for rehearing, 655 F.2d 613, 616-17 (5th Cir. 1981); and *Tucker v. Peyton,* 357 F.2d 115, 118-19 (4th Cir. 1966).

On the basis of the foregoing, the undersigned finds Respondent's contention that Petitioner is not in custody pursuant to the requirements of 28 U.S.C. §2241(c) and §2254(a) to be without merit.

Petitioner and Respondent have both extensively briefed the following issues which were the focus of Petitioner's application for habeas corpus relief:

> (1) Whether Petitioner young exhausted his remedies in state court as to all issues and evidence under consideration in the instant case, as required by 28 U.S.C. §2254(b);
>
> (2) Whether Petitioner is barred from consideration of the merits of the instant application for habeas

corpus due to a procedural default by Petitioner with respect to his conviction in 1976 in Dallas County in Cause No. F-76-4846-PI;

(3) Whether Petitioner's plea of guilty in Cause No. 27530 in Grayson County, Texas, was not knowing, and whether Petitioner's plea of guilty in such case was not voluntary;

(4) Whether Petitioner was deprived of the effective assistance of counsel at his trial on a plea of guilty in Cause No. 27530 in Grayson County, Texas;

(5) Whether Petitioner's conviction in Cause No. 27530 in Grayson County, Texas, is constitutionally invalid; and

(6) Whether Petitioner's conviction in Cause No. 76-4846-PI is constitutionally invalid as it depends upon a conviction which is constitutionally invalid.

These issues will be taken in turn.

The state trial court considered each of the issues raised in Petitioner's instant application for writ of habeas corpus in Cause No. 27530 in Grayson County, Texas, on the merits, during the course of considering Petitioner's state application. At the conclusion of such a review, the state court made the following finding:

(1) Counsel was appointed to represent Petitioner in Cause No. 27530, on February 16, 1963, the date Petitioner entered a plea of guilty in such case;

(2) At that time [petitioner] had been confined in the Grayson County Jail since December 27, 1962.

(3) Petitioner himself had already worked out [a] plea bargain with the prosecuting attorney before his attorney was appointed.

(4) [Petitioner's] counsel did not discuss the facts of the case with the prosecuting attorney, or conduct any investigation into the facts of the case.

(5) [Petitioner's] counsel did not make independent inquiry as to whether or not Petitioner's probation had already been revoked in Cause No. 27530, but assumed from what Petitioner had told him that such probation had already been revoked at the time the plea of guilty was entered in Cause No. 27530.

(6) Petitioner's appointed attorney did not ask Petitioner about any defenses he might have, and did not discuss with Petitioner his right to appeal from the order revoking probation.

Because of the identity of the issues raised in both Petitioner's state writ application and the instant application, there is little question that Petitioner has exhausted all available state remedies as to the issues raised in the instant application. However, Respondent has contended that Petitioner failed to exhaust his state remedies because he offered evidence at the hearing held by the undersigned in addition to what had been offered to the state court. Petitioner offered the testimony of three witneses: Aileen Inez Motts, Helen Potter, and Linda Prescott, none of whom testified at the state evidentiary hearing, and all of whom were related to Petitioner (Motts is his mother, and Potter and Prescott are his cousins). In fact, the testimony of witnesses Helen Potter and Linda Prescott was merely cumulative, and related only to a circumstantial substantiation of Petitioner's alibi defense to the 1963 burglary charge in Cause No. 27530. These witnesses testified in substance that they had a close relationship with Petitioner since Petitioner's childhood, and that to their knowledge Petitioner has never gotten a driver's licse, and did not know how to drive a motor vehicle. This testimony tended to show that Petitioner could not have commited the offense of burglary in Grayson County during the short period of time that he did not have a direct alibi in Dallas confirmed by Petitioner's mother, Mrs. Motts.

Mrs. Motts was the third witness who testified at the evidentiary hearing. She stated in direct support of Petitioner's alibi defense that she was with Petitioner on the occasion in question for all but a short period of time, and could explain his whereabouts except during that short period of time. The corroboration offered by Mrs. Motts is not dispositive of any issue before this Court, nor before the state court, since Petitioner had already demonstrated to the state court that Mrs. Motts was a witness, as he testified before the state judge in the original habeas corpus hearing. Because the state was aware of the presence of Mrs. Motts, and of her apparent alibity to testify in favor of Petitioner, Petitioner has raised no new or substantial evidentiary issue here. Thus, all crucial factual allegations were before the state courts at the time that they ruled on the merits of Petitioner's state application for writ of habeas corpus. It is the rule governing in this circuit that development of new, but non-dispositive facts does not in itself require return to the state system for exhaustion. As the Supreme Court stated in *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394, 407 n. 18 (1972):

> The question . . . is whether any of Petitioner's claims are so clearly distinct from the claims he has already presented to the state courts that it may fairly be said that the state court had no opportunity to pass on the claim . . ..

Successive and repetitive applications for writ of habeas corpus relief are not required as a predicate to federal habeas corpus relief. *Wilwording v. Swenson*, 404 U.S. 249, 250, 92 S.Ct. 407, 408, 30 L.Ed.2d 418, 420-21 (1971); *Brown v. Allen*, 344 U.S. 443, 448 n. 3, 73 S.Ct. 397, 97 L.Ed. 469, 484 (1953). The undersigned finds that Petitioner fairly presented the issues in question here to the state courts, and that Petitioner exhausted his state remedies pursuant to 28 U.S.C. 2254(b).

As the the second issue, whether Petitioner is barred from consideration of the merits of the instant application for habeas corpus due to a procedural default by Petitioner with respect to his conviction 1976 in Dallas County in Cause No. F-76-4846-PI, it is Respondent's position that the doctrine of

procedural default as outlined in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), bars consideration of the issues set forth here. This position, however, undercuts the basic function of the great writ of habeas corpus, as outlined by the Supreme Court in previous cases: ". . . to cut through barriers of form and procedural mazes." *Harris v. Nelson*, 394 U.S. 286, 291, 89 S.Ct. 1082, 1086, 22 L.Ed.2d 281, 286 (1969). See also *Hensley v. Municipal Court*, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294, 300 (1973); *Jones v. Cunningham*, 371 U.S. 236, 238, 83 S.Ct. 373, 374-75, 9 L.Ed.2d 285, 289,291 (1963). The court in *Jones v. Cunningham, supra*, stated that:

> [The great writ] is not now and never has been a static, narrow, formulistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.
> P. 291

Thus, within the framework of prior history of the writ, Petitioner's position concerning procedural default must fail, as that position is based upon considerations of comity, not federal power. However, where, as here, state courts do not rely on a state procedural rule in denying relief on post-trial proceedings, a federal court exercising habeas corpus jurisdiction may reach the merits of the claim. See *Francis v. Henderson*, 425 U.S. 536, 542 n. 5, 96 S.Ct. 1708, 48 L.Ed.2d 149, 154 n. 5 (1976); *Lefkowitz v. Newsome*, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196, 202-03 (1975); *Bell v. Watkins*, 692 F.2d 999, 1003-04 (5th Cir. 1982); *Carter v. Estelle, supra*, pp. 442-43; *Morgan v. Estelle*, 607 F.2d 1140, 1142-43 (5th Cir. 1979); *Rummel v. Estelle, supra.*

The State of Texas filed no response to Petitioner's original application for writ of habeas corpus in state court. In addition, the State of Texas did not raise the issue of a procedural bar at the evidentiary hearing held by the state trial court on March 30, 1979. Against this backdrop Respondent argued that since the state appellate court denied Petitioner's state writ application without a written order, this Court should infer or presume that it did so on the basis of a procedural waiver. There

are, however, reasons why it should be concluded that the state appellate court did *not* apply a procedural bar to Petitioner's writ application.

First, Vernon's Ann. Tex. Crim.Pro. Art. 11.07 allows the issue of defendant's fair and impartial trial to be raised for the first time in a state writ application. See also *Ex parte Guzman*, 551 S.W.2d 387, 388 (Tex.Crim.App. 1977); *Ex parte Langston*, 510 S.W.2d 603, 604 (Tex.Crim.App. 1974); *Ex parte Burt*, 499 S.W.2d 109, 110 (Tex.Crim.App. 1973); *Ex parte Jentsch*, 510 S.W.2d 320, 321 (Tex.Crim.App. 1974). Petitioner argued that he did not receive a fair and impartial trial because his conviction was based on an involuntary plea of guilty obtained without the effective assistance of counsel. Thus, Petitioner's claim was reviewable by a state court under Vernon's Ann. Crim. Pro. Art. 11.07, and the authority of the cases cited above.

Second, Respondent has urged repeatedly that Petitioner has not exhausted his state remedies with respect to certain evidentiary matters brought forth in the federal evidentiary hearing. This argument implies the existence of an adequate state remedy pursuant to Vernon's Ann. Crim. Pro. Art. 11.07, *et seq.*, and that Petitioner could make a second application for habeas relief in state court. On the other hand, Respondent also argues that the state appellate court denied Petitioner's original application for habeas corpus on a procedural default basis. If that were so, then Petitioner has no relief available to him on a second or other application for habeas relief before a state court. As Respondent has argued the former point, it may not with consistency argue the latter.

Finally, Respondent's argument that procedural default occurred in Cause No. F-76-4846-PI in Dallas County in 1976 requires the Court here to infer that the state court applied a *federal* jurisdictional prerequisite to bar Petitioner's *state* writ application. There is no basis on which this Court may infer such, and Respondent has provided no such basis.

Since no Texas court has ever relied on a Texas procedural rule of policy to deny relief to Petitioner in any post-trial proceeding involving Cause No. 27530, neither comity nor the

habeas jurisdictional statute require this Court to apply the doctrine of procedural default or waiver as set out in *Wainwright v. Sykes, supra.* Moreover, since the extensive order prepared by the state trial judge recommending the application for habeas corpus be denied was based on an apparently erroneous legal interpretation of at least two of Petitioner's federal constitutional rights, it is especially important that this Court exercise its jurisdiction to clarify the requirements of the United States Constitution for those who stand accused before the Texas state authorities. For example, although the factual findngs adopted by the state court lead to the inevitable conclusion that Petitioner had been deprived of the effective assistance of counsel, the state trial court concluded as a matter of law that Petitioner had not been deprived of his Sixth Amendment right to effective assistance of counsel. In addition, the state trial court relied on "... his standard procedure ... of admonishment" to conclude as a matter of law that Petitioner's plea was voluntary. The undersigned has found as a matter of fact that Petitioner's plea of guilty was not entered knowingly and voluntarily, and could not have been in the absence of effective assistance of counsel and a full explanation of his rights under the circumstances. Further, as a matter of federal constitutional law, a plea of guilty is not conclusively preseumed to be knowing or voluntary simply because of routine admonishments. (See cases and discussion following third issue set forth below).

As to the third issue, whether Petitioner's plea of guilty in Cause No. 27530 in Grayson County, Texas, was not knowing, and whether Petitioner's plea of guilty in such case was not voluntary, it is important to review the basic rules governing such a consideration. In ascertaining the voluntariness of a guilty plea, a court is required to consider the totality of all the relevant circumstances surrounding the plea. *Brady v. U.S.*, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747, 757 (1970); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763, 772-73 (1970). In order to comport with the due process requirements, a guilty plea must be voluntary, intelligent, and uncoerced; and a defendant must have entered his plea of guilty with full awareness of the relevant circumstances and consequences of his plea. *Bradbury v. Wainwright*, 658 F.2d 1083, 1087 (5th Cir. 1981); *Hill v. Estelle*, 653 F.2d 202, 205 (5th

Cir.1981). After considering all the relevant circumstances, the undersigned has concluded as a matter of fact that Petitioner's plea of guilty was not entered knowingly and voluntarily.

The undersigned has also found as a matter of fact that Petitioner did not understand the charges against him at the time Petitioner entered his plea of guilty. It is clear that without adequate notice of the nature of the charges against him, or proof that a defendant in fact understood the charges against him, his plea cannot be voluntary. *Smith v. O'Grady.* 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859, 861 (1941). For example, under the decision of *Henderson v. Morgan,* 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108, 114, 116 (1976) petitioner's plea of guilty to the charge of second degree murder was held to have been entered without due process of the law where the defendant had not been informed that intent was an element of the charge against him. In the instant case, Petitioner was apparently not informed by counsel or the court of any of the specific elements of proof which the state would have been required to prove beyond a reasonable doubt had Petitioner stood trial for the offense of burglary in Cause No. 27530.

In addition, the undersigned has found as a matter of fact that Petitioner did not fully understand the nature of the constitutional protections which he waived as a result of his plea of guilty. The United States Supreme Court has held that a plea of guilty may be involuntary because an accused does not understand the nature of the constitutional protections he is waiving. See *Johnson v. Zerbst,* 304 U.S. 458, 464-65, 58 S.Ct. 1009, 81 L.Ed. 1461, 1466-67 (1938).

As to the fourth issue, whether Petitioner was deprived of the effective assistance of counsel at his trial on a plea of guilty in Cause No. 27530 in Grayson County, Texas, the undersigned has found that in fact he was so deprived. This conclusion is based upon Petitioner's court-appointed counsel's failure to ascertain whether Petitioner's plea of guilty was being made knowingly and voluntarily, his failure to investigate the case, his failure to communicate with Petition regarding possible defenses, and the like shortcomings. As he raised no such questions and conducted no such investigations, he did not provide Petitioner with reasonably effective assistance of counsel as

required under rulings in *Herring v. Estelle,* 491 F.2d 125, 127-28 (5th cir. 1974) and *Mackenna v. Ellis,* 280 F.2d 592, 601 (5th Cir. 1960).

Concerning the fifth issue, whether Petitioner's conviction in Cause No. 27530 in Grayson County, Texas, is constitutionally invalid, it is clear from a review of the foregoing that it in fact was not valid. Where Petitioner has not received effective assistance of counsel, does not know the nature of the offense or its consequence, and does not know the elements of the offense, this Court may not conclude that such conviction is constitutionally valid.

As to the final issue, whether Petitioner's conviction in Cause No. F-76-4846-PI is constitutionally invalid as it depends upon a conviction which is constitutionally invalid, it is likewise clear that any conviction based upon an invalid conviction is itself constitutionally invalid. See *Burgett v. Texas,* 389 U.S. 109, 113-15, 88 S.Ct. 258, 19 L.Ed.2d 319, 323-25 (1967); *Martinez v. Estelle,* 612 F.2d 173, 175 (5th Cir. 1980). However, as Petitioner has limited himself to a challenge to the validity of his conviction in Cause No. 27530, this final issue may not be disposed of here. See Petitioner's Brief, p. 3 (". . . challenge only the constitutionality of his conviction in [Cause no. 27530] in 1963 . . .").

PROPOSED FINDINGS AND CONCLUSIONS

Accordingly, the undersigned offers the following proposed findings of fact and conclusions of law for the Court's consideration:

(A) **PROPOSED FINDINGS OF FACT:**

(1) The state trial court considered each of the issues raised in Petitioner's instant application for writ of habeas corpus in Cause No. 27530 in Grayson County, Texas, on the merits, following Petitioner's state writ application No. 8226; on March 30, 1979 the state trial court held an evidentiary hearing pursuant to Vernon's Ann. Code Crim. Pro. Art. 11.07 *et seq.*; on June 27, 1979 the state trial court issues a six-page order containing comprehensive findings of fact and

conclusions of law as to the issues raised in Petitioner's instant application.

(2) Findings of fact numbers (3)-(7), below, refer to Cause No. 27530 and were adopted by the state trial court in its order of June 27, 1979.

(3) Counsel was appointed to represent Petitioner in Cause No. 27530, on February 16, 1963, the date Petitioner entered a plea of guilty in such case; at that time [Petitioner] had been confined in the Grayson County jail since December 27, 1962. See State Writ App. p. 1 (Criminal Docket Sheet).

(4) Petitioner himself had already worked out [a] plea bargain with the prosecuting attorney before his attorney was appointed. See State Writ S/F: p. 70, lines 15-20.

(5) [Petitioner's] counsel did not discuss the facts of the case with the prosecuting attorney, or conduct any investigation into the facts of the case. See State Writ S/F: p. 74, lines 24, 25; p. 75, lines 1-3.

(6) [Petitioner's] counsel did not make independent inquiry as to whether petitioner's probation had already been revoked in Cause No. 27530, but assumed from what petitioner told him that such probation had already been revoked at the time the plea of guilty was entered in Cause No. 27530. See State Writ S/F: p. 78, lines 2-6, 23-25; p. 79, lines 1-5.

(7) Petitioner's appointed attorney did not ask petitioner about any defenses he might have, and did not dicuss with petitioner his right to appeal from the order revoking probation. See State Writ S/F: p. 83, lines 23-25; p. 84, lines 1-4.

(8) The following proposed findings.of fact refer to Cause No. 27530 in Grayson County, Texas and are supplementary to but do not contradict any findings of fact made by the state trial court on June 27, 1979.

(9) Petitioner was eighteen years old and had only an eighth grade education at the time he entered his plea of guity in Causes No. 27530. See State Writ S/F; pp. 24,25.

(10) Petitioner's only previous legal experience at the time of his plea of guilty in Cause No. 27530 was a plea of guilty in Cause No. 27302 which Petitioner entered without representation by counsel approximately six weeks prior to his plea in Cause No. 27530. See State Writ S/F; pp. 24-26.

(11) Petitioner was on probation in Cause No. 27302 in Grayson County, Texas, at the time he was charged in Cause No. 27530. See State Writ App. p. 3.

(12) Petitioner did not understand his right to counsel at the time he pleaded guilty to Cause No. 27530. See State Writ S/F: p. 44, lines 22-25; p. 45, lines 1-4.

(13) Petitioner pleaded guilty in Cause No. 27530 in Grayson County, Texas because of Petitioner's erroneous belief that his probation had already been revoked in Cause No. 27302 in Grayson County Texas without a hearing, and that he would serve more time in the Texas Department of Corrections if he pled not guilty to Cause No. 27530 even if he were acquitted, than if he pleaded guilty in exchange for the state's recommendation of a two-year sentence to run concurrent with his sentence in Cause No. 27302. See State Writ S/F: p. 33, lines 6-25.

(14) Petitioner's plea of guilty in Cause No. 27530 was not supported by any evidence. See State Writ S/F: p. 40, lines 11-13.

(15) Petitioner's court-appointed counsel did not make an informed evaluation of potential defenses and specifically the defense of alibi which Petitioner had available to him in Cause No. 27530. See State Writ S/F: p. 81, lines 12-22; p. 82, lines 15-17.

(16) Petitioner's court-appointed attorney would not have advised Petitioner to plead guilty if Petitioner's court-appointed attorney had known prior to his advising Petitioner to plead guilty that Petitioner's probation had not been revoked in Cause No. 27302. See State Writ S/F: p. 84, lines 18-25.

(17) Petitioner's court-appointed attorney was not aware of either the relevant circumstances or the likely consequences of Petitioner's plea of guilty. See State Writ S/F; p. 84, lines 18-25.

(18) Petitioner's court-appointed attorney was not aware of the strength of the state's case against Petitioner at the time he advised Petitioner to plead guilty; Petitioner's court-appointed attorney did not evaluate Petitioner's chances of conviction were Petitioner to stand trial in Cause No. 27530; Petitioner's court-appointed attorney did not predict how the facts as he viewed them would be viewed by a jury or a court of law. See State Writ S/F: p. 74, lines 74, 75; p. 75, lines 1-3.

(19) Petitioner's court-appointed attorney did not provide Petitioner with an understanding of the law in relation to the facts of Petitioner's case. See State Writ S/F: p. 75, lines 5-21.

(20) Petitioner did not make an informed and conscious choice to plead guilty in Cause No. 27530.

(21) Petitioner's court-appointed attorney was not familiar with the facts and law relevant to Petitioner's case; Petitioner's court-appointed attorney did not assist Petitioner actually and substantially in Petitioner's decision to plead guilty. See State Writ S/F: p. 75, lines 5-21.

(22) Petitioner's court-appointed counsel did not fulfill his responsibility to determine whether or not Petitioner's plea of guilty was entered knowingly or voluntarily.

(23) Petitioner did not fully understand the charges against him at the time Petitioner entered his plea of guilty. See State Writ S/F: p. 38, lines 19-25.

(24) Petitioner did not fully understand the nature of the constitutional protections which he waived as a result of his plea of guilty. See State Writ S/F: p. 37, lines 20-23; p. 43, lines 17-25; p. 44, lines 1-3.

(25) Petitioner did not fully understand the consequences of his plea of guilty.

(26) Petitioner's plea of guilty in Cause No. 27530 was not entered knowingly and voluntarily.

(27) Petitioner had available to him the defense of alibi in Cause No. 27530. See State Writ, p. 27, lines 4-8.

(28) The Constitutional invalidity of Petitioner's conviction in Cause No. 27530 cannot be determined from the face of the documents which were presented in Dallas County in support of the enhancement provisions of the indictment in Cause No. F-76-4846-PI.

(29) The state courts have failed and refused to apply the doctrine of procedural waiver to bar consideration of Petitioner's federal constitutional claims of ineffective assistance of counsel and involuntary plea of guilty.

(B) **PROPOSED CONCLUSIONS OF LAW:**

(1) Petitioner has exhausted his remedies in state court as to all issues and evidence under consideration in the instant case as required by 28 U.S.C. § 2254.

(2) Petitioner's prior conviction in Cause No. 27530 in Grayson County bears a positive relationship to his present confinement to the extent that if the prior conviction in Cause No. 27530 were invalidated, Peti-

tioner's present confinement would be shortened or terminated.

(3) No Texas state court has ever relied on a Texas procedural rule or policy to deny relief to Petitioner in any post-trial proceeding involving Cause No. 27530; therefore, neither comity nor the habeas jurisdictional statute require that this Court apply the doctrine of procedural default or waiver as set out in *Wainwright v. Sykes, supra.*

(4) Petitioner's plea of guilty was neither knowing nor voluntary in Cause No. 27530.

(5) Petitioner was deprived of the effective assistance of counsel at his trial on a plea of guilty in Cause No. 27530.

(6) Petitioner's conviction in Cause No. 27530 in Grayson County, Texas is constitutionally invalid.

RECOMMENDATION

ACCORDINGLY, the undersigned recommends that Respondent's Motion to Dismiss based on failure to meet the "in custody" requirement of 28 U.S.C. § 2254(b) be denied, and that the Court enter an order finding that exhaustion requirements of 28 U.S.C. §2254(b) have been met pertaining to Petitioner's claims under Cause No. 27530. It is further recommended that Petitioner's application for habeas corpus relief pursuant to claims pertaining to his conviction in Cause No. 27530 be found meritorious, and granted, and specifically that the conviction said cause be declared invalid for the reasons set forth above.

SIGNED this the 25th day of April, 1985.

/s/

ROGER D. SANDERS

FOOTNOTES

1. The Fifth Circuit has already noted the Respondent's position in another case in which Respondent has urged the court to recognize the liberality and great benefits of its V.A.C.S. Art. 6181-1 plan as compared to the relatively less liberal and less beneficial plans of other states. See, for example, the extensive recitation by the Fifth Circuit of Respondent's claims pertaining to its program in *Rummel v. Estelle,* 587 F.2d 651, on remand, 590 F.2d 103, aff'd. 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed. 2d 382, on remand, 498 F.S. 793. In addressing the *Rummel* case at its first opportunity, the court remarked concerning a life sentence of a Texas prisoner: "Considering Texas' good time system, the inevitable conclusion is that Rummel can be eligible for parole at the end of twelve calendar years, or considering his trustee status, even earlier." p. 659. Thus, the Respondent might exercise caution in urging the Court to conclude that its system under V.A.C.S. Art. 6181-1 is not of actual or potential benefit to one in the position of Petitioner herein.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

JAMES RAY YOUNG,	§	
Petitioner	§	
VS.	§	**CIVIL ACTION**
	§	**S-80-135-CA**
R.K. PROCUNIER,	§	
Director, Texas Department	§	
of Corrections, *Respondent*	§	

ORDER

The petitioner, James Ray Young, applied for the writ of habeas corpus under 28 U.S.C. §2254, attacking a 1963 conviction for burglary, which was used to enhance his punishment for a 1976 burglary conviction. He challenges the constitutionality of the prior conviction, on the grounds that his plea of guilty was not voluntary, and that he was deprived of effective assistance of counsel. The Report of the United States Magistrate recommends granting habeas corpus relief on both ground. The respondent objects to the magistrate's report, contending that this court does not have jurisdiction, that Young failed to exhaust his available state remedies, and that his claims are without merit.

I.

The State of Texas attacks this court's jurisdiction to hear Young's application for habeas corpus, on the ground that Young is not "in custody." First, the State asserts that Young cannot attack a fully served, prior conviction, without challenging his 1976 sentence for which he is presently incarcerated. Respondent's Brief on Jurisdiction and Exhaustion 6 (hereinafter cited as Respondent's Brief). Second, the State contends that *Sinclair v. Blackburn*, 599 F.2d 673 (5th Cir. 1979), *cert. denied*, 444 U.S. 1023 (1980), precludes the exercise of jurisdiction. Respondent's objections to the Report and Recommendation of the United States Magistrate 4 (hereinafter cited as Respondent's Objections).

The requirement of §2254(a) that a petitioner be "in custody" does not mandate physical restraint as a prerequisite to filing an application for the writ. *Spring v. Caldwell*, 692 F.2d 994, 996 (5th Cir. 1982). As the Court of Appeals for the Fifth Circuit noted in *Sinclair*: " '[I]n custody' does not necessarily mean 'in custody for the offense being attacked.' Instead, jurisdiction exists if there is a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration." *Sinclair*, 599 F.2d at 676. The Fifth Circuit has thus considered several petitions challenging prior convictions, even when the petitioner has completed his sentence for that conviction and is not challenging the later conviction for which he is incarcerated. *See, e.g., Carter v. Procunier*, 755 F.2d 1126, 1129 (5th Cir. 1985). Accordingly, Young may properly seek relief for his 1963 conviction without at the same time challenging his 1976 conviction. *Cf. Aucoin v. Jones*, 759 F.2d 449, 450 (5th Cir. 1985) (reviewing exhausted claim from prior conviction that had been presented to the district court while dismissing unexhausted claims from recent conviction).

Also contrary to the State's argument, *Sinclair* does not preclude this court from considering Young's challenge to his 1963 conviction. The Magistrate in his Report points out several ways in which the facts in this case are distinguishable from *Sinclair, see* Report and Recommendation of United States Magistrate 5-9 (hereinafter cited as Magistrate's Report). Moreover, the Fifth Circuit has acknowledged that it has not decided the question that the State's argument raises. "[I]t is still an unsettled question in this circuit to what extent the use of an earlier sentence for enhancement purposes in a present sentence satisfies the custody requirement for the purpose of an attack on the former sentence." *Carter v. Estelle*, 677 F.2d 425, 450 n.22 (5th Cir.), *modified*, 691 F.2d 777 (5th Cir. 1982), *cert. denied*, 460 U.S. 1056 (1983).

The key issue, then, is whether Young is presently in custody for a conviction that is demonstrably related to the conviction that he attacks. The State concedes that the 1963 conviction was one of two prior convictions used to enhance punishment in the 1976 conviction. Respondent's Brief at 1-3, 5. As a result, he is now serving a life sentence for an offense that is usually

punishable by not less than two nor more than twenty years. Young, therefore, is in custody under the 1963 conviction, because it enhanced his punishment in a related conviction. *See Carter v. Procunier*, 755 F.2d at 1129. In *Carter v. Procunier*, Carter challenged a 1969 conviction for embezzlement that was used to enhance his sentence for a 1974 embezzlement conviction. *Id.* Although on the date he filed his application he had completed serving his sentence for his 1969 conviction, the court found that he remained in custody on that day for purposes of challenging that conviction, "since he immediately began serving his life sentence, [which was] related to the 1969 conviction because it was used to impose the 1974 enhanced life sentence." *Id. See also Escobedo v. Estelle*, 655 F.2d 613, 614-15 (5th Cir. 1981) (suggesting incarceration for 1977 conviction might satisfy "in custody" requirement for attacking 1970 conviction used to enhance 1977 conviction); *Carter v. Hardy*, 526 F.2d 314, 315 (5th Cir.) ("the writ is not available where the sentence challenged has been fully served and is not being used for enhancement purposes"), *cert. denied*, 429 U.S. 838 (1976). The discussion of good time credits in the Magistrate's Report merely provdies further evidence of the way in which Young, today, is in custody pursuant to a conviction that is positively related to the 1963 conviction that he attacks.

II.

As a result of *Strickland v. Washington*, ____U.S.____, 104 S.Ct. 2052 (1984), a convicted defendant who claims ineffective assistance of counsel must show that the counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *Id.* at 2064. The magistrate found that Young was deprived of effective assistance of counsel, because his court-appointed attorney failed to discuss the facts of the case with him, did not investigate the case, did not communicate with Young about possible defenses, did not determine Young knew the nature of the offense, and failed to inform Young about the specific elements of burglary. Magistrate's Report at 20-21. Indeed, Young had negotiated his own plea bargain with the prosecuting attorney before an attorney was appointed to represent him. *Id.* at 12. These facts indicate that the magistrate correctly concluded that the performance of Young's court-appointed attorney did not constitute reasonably

effective assistance. *See Gaines v. Hopper*, 575 F.2d 1147, 1150 (5th Cir. 1978) (failure to conduct investigation that would allow evaluation of defenses and failure to discuss realities of defendant's case with client constitutes ineffective assistance of counsel). *Cf. Baty v. Balkcom*, 661 F.2d 391, 395 (5th Cir. 1981) (inadequate preparation for trial amounted to ineffective assistance when counsel conducted no investigation before trial, did not read the preliminary hearing transcript, interviewed no witnesses, communicated only briefly with client, was ignorant of co-defendant's damaging testimony, and was silent at trial), *cert. denied*, 456 U.S. 1011 (1982).

The Supreme Court's ruling in *Strickland v. Washington*, however, requires a second determination—whether the attorney's performance prejudiced the defendant. Although *Strickland* concerned the performance of counsel at trial, the Court applied the two-part standard for evaluating claims of ineffective assistance of counsel to guilty pleas in *Hill v. Lockhart*, 54 U.S.L.W. 4006 (U.S. November 18, 1985). *Accord: United States v. Gavilan*, 761 F.2d 226, 228 (5th Cir. 1985). In *Hill*, the Court held that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 4008. The Court rejected Hill's petition, because he did not allege that the misinformation that his counsel provided about his parole eligibility date cause him to plead guilty. *Id.*

In this action, on the other hand, Young alleges circumstances that indicate he would have insisted on going to trial, except for his counsel's errors. *See* Magistrate's Report at 24-26. Young's counsel did not ascertain whether Young's probation had been revoked after his arrest for burglary, and did not disuss with Young his right to appeal from an order revoking probation. *Id.* at 12. Since Young had already been confined in jail for six weeks at the time he entered his plea, it appears likely that he was discouraged from seeking a trial on the burglary charge, when it was his perception that he would already be serving a two year sentence for his previous conviction. The magistrate, in fact, found that Young erroneously thought he would receive a longer sentence if he pleaded not guilty than if he pleaded guilty. Thus, the misunderstanding

about his probation status, unlike the petitioner's misinformation about his parole eligibility date in *Hill v. Lockhart*, affected his decision to plead guilty rather than go to trial. There is a strong probability that Young would have insisted on a trial in 1963, if he had been informed of the effect of a plea of not guilty and of his ability to challenge his revocation of probation.

Besides the effect of the erroneous belief that his probation had been revoked, Young was also prejudiced by his counsel's failure to determine that Young wanted a jury trial. Although the state court found that Young told his attorney that he was guilty, there was no determination that that confession meant Young did not want a jury trial. In the state habeas corpus proceeding, his former attorney stated that he would have tried the case if Young desired. But Young was influenced by his erroneous perception of his right to challenge not only his arrest for burglary, but also his revocation of probation. Attorneys have a duty to become familiar with the relevant facts, advise the client of available options, and investigate and explain potential defenses. *Hobbs v. Blackburn*, 752 F.2d 1079, 1083 (5th Cir. 1985). If Young's counsel had inquired about the facts and possible defenses and then investigated Young's alibi defense, it is likely that the attorney would have advised Young differently. Although counsel have no duty to investigate frivolous, implausible, or meritless defenses, *United States v. Carr*, 740 F.2d 339, 349 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1865 (1985), Young's alibi defense is not implausible. In addition, unlike the petitioner in *Craker v. Procunier*, 756 F.2d 1212, 1215 (5th Cir. 1985), Young did not know the elements of the offense for which he was charged. Magistrate's Report at 20. The failure of Young's counsel to determine whether the plea was based on a correct perception of his, Young's, legal rights, and was thus voluntary, worked a substantial disadvantage to Young and his defense.

After reviewing the other issues raised by the respondent, it is found that the magistrate's report and recommendations should be adopted. Accordingly, it is

ORDERED that the respondent's motion to dismiss based on failure to meet the "in custody" requirement of 28 U.S.C. §2254(b) shall be, and it is hereby, DENIED. It is further

ORDERED that Young's application for habeas corpus relief from his 1963 burglary conviction, Case No. 27530, in the District Court of Grayson County, 15th Judicial District of Texas, shall be, and it is hereby, GRANTED. It is further

ORDERED that issuance of the writ of habeas corpus shall be, and it is hereby, STAYED, for a period of twenty days after the date of service of this order upon respondent's counsel, in order that respondent may take such actions as may be necessary to appeal from this order, should he choose to do so.

SIGNED and ENTERED this 30th day of December, 1985.

/s/

CHIEF JUDGE

APPENDIX D

James Ray YOUNG, Petitioner-Appellee,

v.

James A. LYNAUGH, Interim Director Texas Department of Corrections, Respondent-Appellant.

No. 86-2064.

United States Court of Appeals,
Fifth Circuit.

July 20, 1987.

Appeal from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, RUBIN and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

After many years of seeking relief from an allegedly voluntary guilty plea to a 1963 burglary charge, Petitioner James Ray Young obtained from the district court a writ of habeas corpus. Young claimed to receive not merely ineffective assistance of counsel, but no assistance whatever regarding his plea. Below and on appeal, the state has played procedural football, urging the federal judiciary to punt Young's claims entirely, or at least to lateral them back to the state courts. We find that the district court properly entertained Young's petition, but that it must retain possession of his claims for further substantive consideration.

The state contends that Young is not "in custody," and thus that the district court lacked jurisdiction to consider his petition. Second, even if jurisdiction exists, the state urges us to decline jurisdiction on equitable and comity-based grounds. Third, the state argues that Young has failed to exhaust state remedies by presenting corroborative testimony at his federal

habeas hearing. Fourth, the state claims that fact-findings of the state court habeas judge preclude review of Young's substantive claims. Each of these contentions is meritless. However, the district court failed properly to find prejudice under the applicable standard for ineffective assistance of counsel. We therefore vacate the judgment and remand for further proceedings consistent with this opinion.

I. The Players and the Background

Late in 1962, an eighteen-year-old Young was arrested for a burglary in Cause No. 27530. Lacking counsel and erroneously believing that his probation—resulting from an uncounseled plea arrangement, formed in Grayson County, Texas six weeks prior to this arrest—had been revoked young negotiated a plea arrangement for a two-year concurrent sentence.

On February 16, 1963, counsel was appointed to represent Young in the 15th District Court of Grayson County. After conducting no inquiry regarding the facts of Young's case, the status of Young's probation, the strength of the prosecution's case or Young's potential defenses thereto, counsel, also presuming that Young's probation had been revoked, advised Young to plead guilty to the arrangement that Young had negotiated. Counsel did not instruct Young as to the elements of the crime with which Young was charged, nor as to the consequences and nature of Young's plea. Young pled guilty that same day, and did not appeal his conviction.

In 1964, Young was convicted of burglary, Cause No. E-4624-K, in the Criminal District Court No. 4 of Dallas County, Texas. Young did not appeal.

In 1976, Young again was arrested and charged with burgiary, Cause No. F76-4846-PI, in the Criminal Court No. 2 of Dallas County. Young pled not guilty, but the jury convicted. The indictment in F76-4846-PI set forth the two prior burglary convictions, which the jury found to have occurred. The trial court assessed the mandatory punishment for a burglary sentence enhanced by the two prior convictions—which is life imprisonment, *see* Texas Penal Code Ann. § 12.42(d) (Vernon Supp. 1974)—and Young unsuccessfully ap-

pealed his conviction. *Young v. State,* 573 S.W.2d 817 (Tex.Crim.App. 1978).

Late in 1978, Young filed a *pro se* habeas corpus petition in the Grayson County court challenging the 1963 conviction on the basis of ineffective assistance of counsel and an unknowing and involuntary plea. The judge, who had accepted Young's 1963 plea, appointed counsel, who amended the petition. The state court judge held an evidentiary hearing in 1979, and issued an order, including findings of fact and conclusions of law, denying relief on the merits. Young unsuccessfully appealed this order.

In 1980, Young field the instant federal writ application *pro se*, challenging the 1963 conviction on the same grounds. Late in 1980, the district court referred the case to a magistrate, who issued a show cause order to the state in 1981. The state responded with a motion to dismiss, conceding habeas jurisdiction but arguing that Young's failure to object to the 1963 sentence during its use for enhancement at the 1976 trial constituted a procedural default barring further consideration of Young's 1963 claims. Young responded to the motion to dismiss, and requested an evidentiary hearing and the appointment of counsel.

In 1983, the district court referred the case to another magistrate who, in 1984, appointed the same attorney who argued Young's state habeas petition. During a telephone conference, Young's counsel indicated that Young was challenging only the 1963 conviction, not its use for enhancement. At that point, the state objected that Young was not "in custody" for habeas purposes.

The magistrate then held an evidentiary hearing and, in 1985, issued proposed findings of fact and conclusions of law, suggesting that the district court reject the state's procedural challenges and grant relief on Young's substantive claims. The state objected to the magistrate's recommendations. On December 30, 1985, the district court adopted the magistrate's findings and granted relief from the 1963 conviction because

Young had received ineffective assistance of counsel. The state appeals.[1]

II. Jurisdiction on the § 2254(a) Playing Field

28 U.S.C. § 2254(a) provides that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." In *Carter v. Estelle*, 677 F.2d 427, 450 n. 22 (5th Cir.1982) (citation omitted), *reh. denied*, 691 F.2d 777 (5th Cir. 1982), *cert. denied*, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983),

> [w]e note[d] that it is still an unsettled question in this circuit to what extent the use of an earlier sentence for enhancement purposess in a present sentences satisfies the custody requirement for the purpose of an attack on the former sentence. *See generally Escobedo v. Estelle*, [650 F.2d 70, *modified on petition for rehearing*, 655 F.2d 613 (5th Cir. 1981)] (suggesting that requirement may be satisfied, if, according to the rule of *Sinclair v. Blackburn*, 599 F.2d 673, 676 (5th Cir. 1979), *cert. denied*, 444 U.S. 1023, 100 S.Ct. 684, 62 L.Ed.2d 656 (1980), petitioner can show a positive demonstrable relationship between the prior conviction and the petitioner's present incarceration).

The district court properly identified this state of the law, and settled the question by finding Young in custody due to the 1976 enhancement.

Although the state conceded below and on appeal that "as a matter of historical fact, Young is "in custody' due to his 1963 conviction because it was used for enhancement of punishment

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1. During the pendency of the federal writ application, Young challenged the 1964 conviction in a petition to the Criminal Court No. 2 of Dallas County. This petition was unsuccessful. Young's application to the Court of Criminal Appeals was denied in 1983.

in 1976 .... [the state contends that] Young is not 'in custody' for purposes of the instant federal habeas action because he has made the tactical decision to challenge *only* the 1963 conviction and not its use for enhancement." First, the state argues, because Young has fully served the 1963 conviction, there is no "positive, demonstrable relationship" under *Sinclair* between the conviction that Young challenges and Young's current custody so as to convey jurisdiction. Second, because Young allegedly is likely successfully subsequently to challenge his 1976 conviction if this writ were to issue, a finding of custody would sanction piecemeal litigation. Third, were we to entertain the petition, the state would be deprived of an opportunity to argue procedural default under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).[2]

[1] The state candidly concedes that Young's 1963 conviction is "positively and demonstrably related" to the enhanced 1976 life sentence, but (admittedly "hyper-technically") claims that it is not demonstrably related to his present confinement because he is not currently challenging this confinement. The greensward of § 2254(a), however, reveals no such hyper-technical pitfall. As we stated in *Sinclair* and reiterated in *Escobedo*, " ' "in custody" for jurisdiction under § 2254(a) does not necessarily mean "in custody for the offense being attacked." ' " *Escobedo*, 655 F.2d at 614 (quoting *Sinclair*, 599 F.2d at 676); *see also Carter v. Procunier*, 755 F.2d 1126, 1129 (5th Cir. 1985); *Cappetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir. 1969) (citing Carafas, La Valle, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d

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2. We discuss the state's second and third challenges below, because these comity-based or equitable arguments are not jurisdictional. *See Sykes*, 433 U.S. at 83, 97 S.Ct. at 2504 (*Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), overruling *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953), "acknowledged 'a limited discretion in the federal judge to deny relief ... to an applicant who had deliberately by-passed the orderly procedure of the state courts' " "[a]s a matter of comity but not of federal power"); *id.* at 96 n. 4, 97 S.Ct. 2511 n. 4 (Stevens, J., concurring) (procedural default is a "matter of equitable discretion rather than a question of statutory authority; ..."); 28 U.S.C. § 2254 Rule 9(b) Adivsory Committee Note ("The bar set up by subdivision (b) [permitting dismissal of successive petitions] is not one of rigid application, but rather is within the discretion of the courts on a case-by-case basis.").

554 (1968), and other cases), *cert. denied*, 396 U.S. 846, 90 S.Ct. 55, 24 L.Ed.2d 96 (1969). There is clearly (and admittedly) a positive and demonstrable nexus between Young's current custody and the allegedly unconstitutional conviction sufficient to meet the jurisdiction requirement of § 2254(a).

To further assure that Young's claims were located between the habeas hashmarks, the district court adopted the magistrate's finding that Young is "in custody," because Young "will receive 'credit in some degree' on his current sentence" were the 1963 conviction voided. The state claims that, even in this regard, Young's petition did not demonstrate a positive relationship under *Sinclair*; Young introduced no "evidence" to demonstrate the likelihood of his earlier release, and the magistrate improperly "engaged in a series of perplexing and illogical presumptions and assumptions" to reach a conclusion that credit would ensue "based solely on the magistrate's reading of the Texas laws governing parole." The state's argument again runs out of bounds of the applicable law.

Sinclair, in which the Board of Pardons failed to grant *clemency*, explicitly distinguished *Cappetta v. Wainwright*, because of the subjective judgment of the Board's determination. *Sinclair*, 599 F.2d at 676. In *Cappetta*, the petitioner challenged a fully-served (Dade) conviction although in custody on another (Hillsborough) conviction, which commenced upon expiration of the Dade sentence.

> [A] successful attack on the Dade sentence will result in his release under the Hillsborough sentence, *presumably though unstated*, because of some Florida law allowing credit under the circumstances or because of the wording of the Hillsborough sentence. That sentence is not a part of the record and was apparently not before the District Court. Appellant cites no Florida or other authority providing such a form of credit.... We hold that the court has jurisdiction . . . *to determine whether the relationship*, as claimed, between the present confinement and the Dale County judgment is such as *would result in the appellant receiving credit in some degree* on the Hillsborough

> sentence if he should prevail on the merits of his petition.

406 F.2d at 1239 (emphasis added). Contrary to the state's interpretation of *Sinclair*, *Cappetta* instructs that, when a petitioner *alleges* credit, the court has jurisdiction over the petition *to determine* whether credit would be provided, even if the petitioner has cited to no authority or law that would demonstrate an earlier release. Relief is not "speculative and remote," *Diehl v. Wainwright*, 423 F.2d 1108, 1109 (5th Cir. 1970) (also distinguishing *Cappetta*), but sufficiently likely to require consideration of credit and of the merits, *see Sammons v. Rodgers*, 785 F.2d 1343 (5th Cir. 1986). The magistrate properly covered the turf of Texas parole.

[2,3] The magistrate's determination that, according to Texas parole procedures, Young will receive credit "in some degree" if he succeeds on the merits of his petition is not clearly erroneous. Jurisdiction therefore lies to entertain the habeas petition, *See Wolf v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Preiser v. Rodriguez*, 411 U.S. 475, 487, 93 S.Ct. 1827, 1835, 36 L.Ed.2d 439 (1973), and the case is not moot, *see Carter, 755 F.2d at 1130 (citing Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)). Notwithstanding, the state would require Young or the magistrate to perform the impracticable or impossible, *viz.*, to determine the precise degree of credit Young would receive. *See generally* Jasuta, *Time Credits and Related Problems*, 49 Tex.Bar J. 954 (Oct. 1986) (describing the byzantine intricacies of Texas parole procedures). It would be manifestly unfair to require, for Young or any other habeas petitioner to obtain review, that the magistrate determine with certainty that the petitioner's custody would be reduced, once the magistrate has determined that a *prima facie* case exists for obtaining some degree of credit. The state is the only party in a position to demonstrate conclusively that the petitioner would obtain no relief. The state cannot be prejudiced except by its own failure to place such information before our judicial purview, and thus will not be heard to complain of its nonstrategic formation.

III. Illegal Motion

The state contends that a joint application of *Escobedo* and *Moran v. Estelle*, 607 F.2d 1140 (5th Cir. 1979), somehow will prevent the state from asserting that Young's failure to object contemporaneously in 1976 to enhancement of his sentence by the 1963 conviction bars consideration of an anticipated subsequent petition challenging the 1976 conviction. Because the procedural default doctrine of *Sykes* allegedly could be asserted were Young to challenge enhancement in the instant petition, *Sykes* should be extended orthogonally to block consideration of this present, putatively piecemeal petition, which does not confront the unobjected-to enhancement.

[4] But even here, the state is improperly in motion before the snap and meritlessly attempts to raise concerns that are not even remotely at issue at this time. The state challenges a petition that does not allege enhancement and not the hypothetical petition that might. Thus, the state would have us deny Young relief not just from enhancement, but also from the improper parole classification, relief to which Young is clearly entitled if his claims are meritorious. This elimination of an existing remedy cannot be sanctioned under Rule 9(b)[3] or any principle of comity. As we stated in *Escobedo*, the " 'mere possibility of success in additional ... proceedings does not bar federal consideratin of the claim.' " 650 F.2d at 74 (quoting *Galtieri v. Wainwright*, 582 F.2d 348, 354 n.12 (5th Cir.1978) (en banc)). Procedural default might be applicable were Young eventually to challenge the enhancement, but it cannot appropriately be injected into this petition.

In the event that Young brings a subsequent petition, the state may then assert its contemporaneous objection rule. We pretermit any decision on the application of procedural default until such a rematch occurs on our judicial schedule. We therefore have no occasion to consider Young's additional response that *Hill v. State*, 633 S.W.2d 520 (Tex.Crim.App.1981),

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3. 28 U.S.C. § 2254 Rule 9(b) states: "A second or successive petition may be dismissed if ... the failure of the petitioner to assert [new] grounds in a prior petition constituted an abuse of the writ.").

altered the applicable law of *Smith v. State*, 486 S.W.2d 374 (Tex.Crim.App.1972), and that there did not exist a contemporaneous objection requirement in 1976 on which Young could have defaulted. We also express no opinion concerning the exhaustion of state remedies for Young's subsequent petition.

IV. Adequate Preparation and Training

Citing *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *Joyner v. King*, 786 F.2d 1317 (5th Cir. 1986), *cert. denied sub nom. Joyner v. Phelps*, ____U.S.____, 107 S.Ct. 653, 93 L.Ed.2d 708 (1986); *Rodriguez v. McKaskle*, 724 F.2d 463 (5th Cir. 1984), *cert. denied. sub nom. Rodriguez v. Procunier*, 469 U.S. 1039, 105 S.Ct. 520, 83 L.Ed.2d 408 (1984); *Brown v. Estelle*, 701 F.2d 494 (5th cir. 1983); *Burns v. Estelle*, 695 F.2d 847 (5th Cir. 1983); and *Winfree v. Maggio*, 664 F.2d 550 (5th Cir.1981), the state contends that Young's current petition alleges new facts or legal theories not presented to the state courts and, therefore, his petition should be dismissed for failing to exhaust state remedies. As we stated in *Joyner:*

> In *Brown* ... we held that when a claim in a significantly different and stronger evidentiary posture than it was before the state courts is filed in federal court, the exhaustion doctrine required, nonetheless, further proceedings in state court.... In *Burns*, we held that a state habeas petitioner who presented in federal court entirely new evidence of his claim of ineffective assistance of counsel had failed to satisfy the exhaustion requirement ... Joyner's new factual allegations include several items of evidence ... [W]e are unwilling to depart from a settled rule to accomodate new factual allegations in support of a previously asserted legal theory, even though these factual allegations came into existence after state habeas relief had been denied.

786 F.2d at 1319-20.

Although the state invokes a valid theory of exhaustion, the state mischaracterizes this petition as having raised "new facts"

before the district court. Young had alleged in his state habeas petition and hearing the relevant facts of his potential alibi defense in relation to the voluntariness of his guilty plea and the effective assistance of his counsel, which we discuss below.

(5) The magistrate correctly found that "all crucial factual allegations were before the state courts at the time they ruled on the merits of Petitioner's state application for writ of habeas corpus." We therefore dismiss the state's final, feeble effort to avoid substantive consideration by arguing exhaustion. "Concluding as we do that the alleged 'new facts' are not new at all, we cannot see how our consideration of these same facts in any way undercuts the State court, or creates any friction between the state and federal judicial systems." *Vela v. Estelle*, 708 F.2d 954, 960 (5th Cir. 1983), *cert. denied sub nom. McKaskle v. Vela*, 464 U.S. 1053, 104 S.Ct. 736, 79 L.Ed.2d 195 (1984).

V. The Substantive Conflict and § 2254(d)

Drawing directly from and supplementing the state habeas court's factfinding in 1979, the magistrate proposed several findings of fact. Young entered his guilty plea in 1963 after having been in jail for six weeks and after negotiating the agreement on his own. Young had only an eighth grade education at the time of his plea, did not understand his right to counsel, and pled guilty because he erroneously believed that his probation had been revoked. Young thought that he would serve greater time if he pled *not* guilty, *even if he were acquitted*, than if he pled guilty. He pled in exchange for the state's recommendation of a concurrent sentence. Young understood fully neither the charges against him nor the consequences of his guilty plea. Finally, Young's plea was not supported by *any* evidence.

[6] Young's counsel, appointed on the date that Young pled, did not discuss the facts of the case with Young or with the prosecuting attorney, and did not conduct an independent investigation. Counsel did not inquire into any potential defenses that Young might assert, including Young's alibi defense, did not know the strength of the state's case nor Young's chances of success, and did not provide Young with an understanding of how the law applied to the facts of his case. Counsel would not have advised Young to plead guilty had he known that the

probation had not been revoked. As a result of Young's own misunderstandings and of counsel's failure to correct them, Young did not make a knowing and voluntary, or informed and conscious, choice to plead guilty.

The magistrate thus proposed six conclusions of law, including that Young's plea was neither knowing nor voluntary; that Young was deprived of effective assistance of counsel; and that Young's conviction was constitutionally invalid. The district court adopted the magistrate's findings of fact, and granted Young relief. The district court reasoned that, because

> Young had already been confined in jail for six weeks at the time he entered his plea, it appears likely that he was discouraged from seeking a trial on the burglary charge, when it was his perception that he would already be serving a two year sentence for his previous conviction. The magistrate, in fact, found that Young erroneously thought he would received a longer sentence if he pleaded not guilty than if he pleaded guilty.... There is a strong probability that Young would have insisted on a trial in 1963, if he had been informed of the effect of a plea of not guilty and of his ability to challenge his revocation of probation.

The state does not dispute the district court's factfinding, but argues that an additional fact, found by the state habeas judge, precludes the conclusion that Young's counsel was ineffective: "Prior to pleading Petitioner guilty, Petitioner told his attorney that he had committed the offense charged." Because of this fact, the state believes that the district court failed to accord the presumption of correctness to the state court's factual findings required under 28 U.S.C. § 2254(d).[4] *See Sumner*

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4. 28 U.S.C. § 2254(d) provides: "In any proceeding instituted in Federal court by an application for a writ of habeas corpus ... a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an office or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit" that any of eight enumerated defects in the state court factfinding procedures occurred.

See Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The state again fumbles its argument, because this fact does not conflict with the magistrate's findings. Nevertheless, we must vacate the district court's legal determination, because the district court may have impermissibly relied upon the alibi defense in determining prejudicial ineffective assistance of counsel.

To be successful in a claim of ineffective assistance of counsel in regard to a guilty plea, a petitioner must show not only that his counsel's performance was deficient, but also that the deficient conduct prejudiced him. *Hill v. Lockhart*, 474 U.S. 52, ____, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985) (applying *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Prejudice is demonstrated by showing that the plea process would have been affected had petitioner received adequate counsel. *Id.* The different outcome cannot merely be a "better" plea, but that petitioner "would not have have pleaded guilty and would have insisted on going to trial." *Id.; see Craker v. McCotter*, 805 F.2d 538, 542 (5th Cir. 1986). Further,

> where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than to go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a predication whether the evidence likely would have changed the outcome of the trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Hill, 474 U.S. at _____ __ _____, 106 S.Ct. 370-71; *see Brown v. Butler*, 811 F.2d 938, 942 (5th Cir. 1987).

In the instant case, the district court held that the conduct of Young's counsel was constitutionally deficient because of

counsel's failure to undertake *any* investigation of the case, to interview the client, to evaluate the state's evidence, to insure that Young understood the nature and elements of the offense, and to determine whether any defenses existed. *Citing Gaines v. Hopper,* 575 F.2d 1147, 1150 (5th Cir. 1978); *Baty v. Balkcom,* 661 F.2d 391, 395 (5th Cir.1981), *cert. denied,* 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982). The district court found it likely that counsel would have advised Young differently had he investigated the alibi defense. But for these failures, the district court determined, there would be a strong probability that Young would have gone to trial.

[7] However, the district court did not make any finding that, if the ineffective assistance upon which relief was granted was the failure to investigate exculpatory evidence or to assert affirmative defenses, Young might have succeeded at trial or might have obtained other significant relief from his having gone to trial than from his having entered a guilty plea. Similarly, it is not self-evident that going to trial would have altered the outcome of Young's parole revocation. We thus do not know on which ground or grounds the district court found prejudice from the alleged ineffective assistance of counsel. To the extent that the district court granted relief based upon the likelihood of success of the alibi defense, however, the district court's decision was improper.

[8] The state court found that Young had told his attorney that he committed the offense charged, even though they did not discuss the facts of Young's case. The magistrate and district court found that Young did not understand the charges against him. Thus, Young implicitly could not have known whether or not he committed the offense *regardless* of what he admitted. Notwithstanding, the attorney's conduct could not be deficient for failing to pursue the alibi defense. Given Young's statement, the attorney could only believe that he would suborn perjury were he to permit the alibi to be asserted. *See Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Although Young may be perfectly honest in asserting at this time that he did not commit the offense, we are precluded by § 2254(d) from disregarding such an admission to his attorney. *See id.* at ____, 106 S.Ct. at 1002-03 (Blackmun, J., concurring).

A harder question is presented by the district court's potential reliance on the failure of counsel to investigate the status of parole. The state court found that Young's counsel "assumed from what petitioner told him that such probation had already been revoked at the time the plea of guilty was entered...." Normally, Young would not be able to claim that his attorney was deficient for relying on information that Young supplied. *See, e.g., Johnson v. Cabana*, 805 F.2d 579, 581-82 (5th Cir.1986). Here, however, Young's testimony in the state court indicates that Young likely was misled deliberately by the prosecuting attorneys to induce his plea.[5]

[9] The district court did not make a factual finding that Young deliberately was misled. We have yet to address whether an attorney has a duty to make a reasonable effort to discover prosecutorial misconduct employed against his or her client,

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5. Young testified as follows at the state habeas hearing:

Q. So an Assistant County Attorney talked to you about entering a plea of guilty on this charge. He told you or led you to believe, or you understood from what he said, that your probation had already been revoked in this cause, in this previous cause, [the six-week earlier plea]?
A. That was the understanding on our first discussion around the end of January or the first of February, 1963, that he gave me. He told me if i did not plead guilty to 27,530, that I would be, my probation in 27,302, since it had already been revoked, I would go to the penitentiary. The Case No. 27,530 would beigeonholed and when I did my time, completed serving my sentence in 27,302, that I would be returned to Grayson County jail to answer charges in Case No. 27,530.

....

Q. And then what happened after that?
A. I went back to six tank of Grayson County jail, which I had been transferred to from five tank when they got an opening. I thought about it for awhile. I wanted—Ifigured the quickest way to get out of the penitentiary was to go on and take the case 27,530 so I agreed—I wrote a note to the Assistant District Attorney and told him that I wanted to talk to him and upon the second discussion, which was some time in February, prior to February 16, 1963, we agreed upon a two-year plea of guilty in 27,530 to run concurrently with 27,302.
Q. So effectively it was represented to you if you entered a plea of guilty, you wouldn't serve any more time than you have to anyway on your probation, but if you didn't enter the plea of guilty, that then it would be hanging over your head the full time during your sentence and you would have to be bench warranted back once you finished your sentence and still not be eligible for parole. is that correct?
A. That is correct.

and perhaps such a matter is better addressed by use of the supervisory powers over the federal courts and of fourteenth amendment due process restrictions in the state courts. On remand, the district court should consider whether the prosecution deliberately misled Young, and, if so, whether Young's plea more properly should be vacated for violating his fourteenth amendment rights rather than for violating his sixth amendment rights.

VI. The Final Score

Because we do not know on which basis or bases the district court found prejudice from Young's ineffective assistance of counsel, we must remand for the district court to clarify its factual findings and legal conclusions. This will assist in determining whether counsel's conduct in fact was deficient. The district court also should determine whether, based upon the facts found and independent of any alleged ineffective assistance of counsel, Young's plea was unknowing and involuntary under the totality of the circumstances. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The district court should directly address whether the facts found by the state habeas court, that petitioner admitted in the trial court that he was acting freely and voluntarily and that the standard practice of the trial judge was not to accept pleas without oral stipulations, preclude this allegation. Finally, if the district court again determines that Young is entitled to relief from his 1963 conviction, it should provide a reasonable opportunity for the state to retry Young, if the state so desires. These determinations should occur as rapidly as possible and without further, unnecessary procedural gamesmanship..

The judgment of the district court is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2064

JAMES RAY YOUNG,
Petitioner-Appellee,

versus

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion July 20, 5 Cir. 1987, ____F.2d____)

(September 15, 1987)

Before GOLDBERG, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a

majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/

United States Circuit Judge

REHG-9